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MODERN TENDENCIES OF LEGISLATION

AN ADDRESS

BEFORE THE TWENTY-FOURTH ANNUAL CONVENTION OF THE

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BY

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MODERN TENDENCIES OF LEGISLATION.

HON. OSCAR CAIN, U. S. DISTRICT ATTORNEY, SPOKANE, WASH.

Legislation, as it is now understood, is a matter of comparatively recent origin. There had been a legislative body in Great Britain for centuries before it undertook to perform any other function than to declare what the law was. The Saxon idea being that the law was something that had always existed and was known to every one, and that the only purpose of a legislature was to declare the law when some powerful individual or class attempted to over-ride it. This was intended merely as a reminder that the law should remain as it had always been.

In the thirteenth century Parliament began making new laws, but these accumulated very slowly. During the reign of Charles I, the entire output of legislative enactment to that time, collected and bound together, filled but five small volumes—less than the present index of our federal statutes. Gradually, however, legislative bodies awoke to a sense of their powers, and, in this country especially, have exercised them with increasing frequency.

Professor Stimson, who occupies the chair of comparative legislation at Harvard, estimates that during the first half of the last century the legislative enactment of the Congress of the United States, added to the legislative enactment of the several states, is a thousand-fold the entire law making of England for the five centuries preceding, and the present tendency is to increase rather than diminish the amount of legislation. Since 1890 congress has passed more law than during the first one hundred years of the existence of this government. The legislature of Washington, since its organization as a territory, has passed almost as much new law as has been passed in England since the time of Cromwell. This, of course, does not take into account the immense amount of private and special legislation passed in that country.

A similar amount of legislative enactment has characterized the progress of the several states. When we contemplate this vast addition to the written law, the inquiry naturally suggests itself: Whither are we tending, and what is the net result of all this legislation? It is only that part of it which shows a tendency to depart from established usages and introduce new features into our state and federal government with which this paper is concerned.

If there was one subject upon which the founders of this government had more pronounced views than another, it was that of personal liberty. Following the spirit of the English common law, they sought to erect every safeguard and to take every precaution to protect the rights and secure the liberties of the individual man.

In its earlier legislation, congress sought to condemn only those acts, the doing of which would seriously affect the community. The same spirit, with rare exceptions, characterized the early legislation of the states. During the period between 1830 and 1860, however, a reform movement began to spread over the country, and then the idea that the world can be made good by law began to manifest itself in legislation. During that period a number of the states passed prohibition laws, and almost all of them passed laws having for their purpose the regulation of the morals of the individual. This class of legislation received a check during the civil war and the reconstruction period which followed; but in recent years has broken out with increased violence.

Blackstone tells us, that in legislation by the people, they will show great caution in making new laws which may interfere with their rights and liberties. Exactly the reverse has proven true. There have seldom been as many restrictions placed upon the conduct of a people by a monarch as the people of this country have placed upon themselves. We seem perfectly willing that the legislature elected by ourselves may impose upon us the standards of self-righteousness of any sect or faction.

The distinction between those things which are criminal and those things which are merely sinful is entirely lost; and, going further, we legislate against those things which are neither sinful nor criminal, but which the passing whim of some individual or organization seeks for the moment to condemn.

Some penurious traveler observes that the man who gives the porter or waiter a quarter, gets better service than himself. In his anger he goes to the legislature and a law against tipping is the result.

Some man goes out with a crowd of good-fellows and awakes the next morning with a bad taste in his mouth and a pain in his head, and before his mind becomes clear, he has drafted a statute or an ordinance against treating; and we submit to these regulations upon two conditions: First, they must always be imposed by a legislature which we ourselves have elected; and, second, we must never be required to observe them.

Just prior to the revolution, parliament passed a law authorizing the king's officers armed with writs of assistance, to make searches of the houses of the colonists. The outcry against this precedure is historic. Imagine the indignation that would have been aroused if, in addition to the powers conferred, they had been authorized to make a tour of inspection of the hotels and restaurants to determine if the bed sheets were all nine feet long and the kitchen in a proper state of sanitation. It would have been prominently mentioned in

the Declaration of Independence and made the subject of a clause in the Constitution of the United States. But we, the descendants of those people, are daily permitting restraints to be imposed upon ourselves, any one of which, in the eyes of our forefathers, would have justified the revolution.

In the State of Washington a man may not take a drink upon a train or other public conveyance, or give a dime to the porter who shines his shoes, or the waiter who serves his meal, or have in his possession any wild bird, living or dead; or sell whiskey under four years old, unless it be Scotch or Irish whiskey; or cut his neighbor's harness when his team is hitched at a religious meeting, or untie a horse from a post to which it has been hitched by its owner, or post a handbill upon a fence; or, if he be afflicted with insomnia. walk the streets at late or unseemly hours without subjecting himself to prosecution; nor may a boy throw a stone at a barn, or destroy a bird's nest, or have the eggs of a wild bird in his possession, or kill a honey bee; or have tobacco in any form in his possession until he is twenty-one years old, without subjecting himself to a fine and imprisonment.

In Oklahoma, every person who leaves an animal hitched during cold weather, or in the night time, is guilty of a misdemeanor. The statute does not specify the length of time, or degree of cold required to bring the offender within its operation. In that state the use of profane language is prohibited without regard to time or place. The law applies alike to the man who swears in public and to the farmer, who alone in the field, urges his team to greater activity by the use of language forbidden by the second commandment; and this, too, in a state where farming operations are largely conducted with mules.

Blasphemy is also defined and made punishable by the laws of Oklahoma. Among other things, it consists of "casting contumelius reproach upon the Christian, or any other religion."

In Idaho a fine of not to exceed five hundred dollars is the penalty prescribed for selling intoxicating liquor at a camp meeting. Inasmuch as the laws of that state prescribe a fine of three hundred dollars and six months' imprisonment for selling liquor without a license, it would seem that the statute was enacted to encourage the practice which, by its letter, it forbids.

In several states it is a misdeameanor to bet upon an election, and in one it is an offense for a high school student to enter a fraternity; but it remains for Kansas, the state whose name is so prominent in the great struggle for human freedom, to strike the final blow at the liberty of the citizen. In that state it is made a crime for

any person to eat, or pretend to eat, any snakes, lizzards, scorpions, centipeds, tarantulas or other reptiles in any public place.

The above instances, and many others that might be cited, show the extremes to which legislation has gone in an effort to regulate every phase of human conduct by law. Dr. Samuel Johnson tells us that law is the result of human wisdom acting upon human experience for the benefit of the public. He would doubtless have entertained a different opinion of many of our recent statutory enactments.

This class of legislation would not seem so ridiculous if it had the slightest tendency to decrease the vice or folly at which it is leveled. If, by reason of it, the public peace were less frequently invaded, or, through its passage, public morals had attained to a higher standard, we could feel that we had secured something in return for the liberties we have surrendered. But the most noticeable consequence of such legislation is a wide-spread and growing disrespect for the law. Nobody pretends to obey these laws; no public officer charged with their enforcement seems to understand that they were ever enacted to be obeyed. The public which clamors for their enactment takes not the slightest interest in their enforcement. We seem perfectly willing that any course of conduct may continue if, in addition to its being wicked or foolish, we can make it criminal.

The tendency of modern legislation to create boards and commissions, to which are delegated important functions of state and federal government, is a distinct departure from what was once considered a fundamental principle of popular government and is one of the most striking tendencies of modern legislation.

These commissions are constantly increasing in number and efficiency, in the face of a strong popular prejudice against bureaucracy, and contemporaneously with a growing demand for direct government through the medium of the initiative and referendum and direct primary, to the underlying principles of which they seem in direct opposition. Originally they were mere boards appointed by the governor, and usually selected from the members of his party who had contributed their time and money to his campaign, and who, in return, wished to be rewarded by some official distinction which would not involve exertion or responsibility. Their duties usually consisted of investigating the public institutions and public service corporations under their jurisdiction for the purpose of collecting information to be used as the basis of recommendations to the legislature. The traveling done in the performance of their duties was generally in the nature of a holiday excursion, frequently as the guests of the institution or corporation under investigation. They seldom found any serious fault or recommended any radical

changes. They were chiefly noted for their extravagance, incompetence and inefficiency. Despite the prejudice that their administration of affairs engendered in the public mind, they have greatly increased in number and have been clothed with additional powers. They are now generally composed of men who devote their entire time to the discharge of their duties; who are compensated for their services and who have had some training along the line of the duties which they undertake.

The powers which they now exercise are so extensive that they are referred to by some writers as the fourth department of the government. The power to fix freight rates and rates charged for gas, water and electricity; to fix charges and services of telephone and telegraph companies; to fix charges and service of wharfingers and warehouses, together with the power to order improvements and to prescribe rules for the conduct of the business of such institutions, is, in most states, exercised by these commissions.

In addition to these are industrial commissions, tax commissions; boards of health, boards of control; forest commissions; boards of accountants; highway commissions, and various boards of examiners, which, to a greater or less extent, exercise similar powers.

In the federal government these commissions have their counterpart in the Interstate Commerce Commission, with power to fix freight rates; the Department of Commerce and Labor, with power to try and determine the question of the legal residence of an alleged alien, and the Department of Agriculture, with power to prescribe rules for the regulation of Forest Reserves.

The interesting feature of it all is, that we are centralizing to a certain extent all of the powers of the three original branches of government into a fourth branch, further removed from the popular will than any of the others; and this, at a time when it is commonly supposed we are drifting toward direct government.

In states where the initiative and referendum are in operation, commissioners are being created, clothed with certain powers, legislative in their nature, further removed from the people than ever the legislature was.

While demand for the recall of judges is increasing, commissions exercising highly important judicial functions are springing into existence, the members of which are neither subject to recall nor elected by the people; and strange as it may seem, these commissions find their strongest champions among the people who favor the initiative, referendum and recall.

It is difficult to forsee where this tendency toward government by commission may end. The more strongly the idea may be opposed to the principles advocated by an organization or party,

the more readily that organization or party submits to its rule. There is probably no class of people among whom the sentiment for the recall of judges is so strong as the laboring class; yet they willingly submit the questions arising out of personal injuries received by them to an industrial commission which is appointed by the governor, and which is beyond the reach of popular recall; which has power to promulgate rules governing the amounts to be paid into and out of the accident fund; regulate the proof of accident and extent thereof; the proof of death; the proof of relationship and the extent of dependency of the person claiming damage, and this in a proceeding at which the injured person has no legal right to be present.

Congress has recently created a tariff board or commission, with power to inquire into and make recommendation to congress concerning the duty upon imported articles, and it is seriously proposed to confer upon this, or a similar commission, the power to determine the amount of duty imposed. Such a law will remove from the legislative department a question, the determination of which has in times past, been one of the most important subjects over which it exercised control and which has been the subject of more controversy than any other before the American people. A recent president seriously recommended that the contracts and affairs of all corporations (and the bulk of modern business is done by corporations) should be submitted to a commission.

The immigration laws confer upon the Department of Commerce and Labor power to try and determine the question of legal residence of an alleged alien and to order him deported if found to be illegally in the United States, and its conclusions are binding upon the courts as to all matters of fact.

The power conferred upon the Secretary of Agriculture to prescribe rules for the regulation of forest reserves, a violation of which is punishable by fine and imprisonment, is a power which at one time was supposed to rest exclusively with the legislature. It required some very ingenuous reasoning upon the part of the Supreme Court of the United States to save this statute from conflict with the constitution.

And thus the idea that the government is composed of the legislative, executive and judicial branches is gradually being encroached upon; and a fourth department is springing into existence, combining the powers of all of the other three.

In much of the legislation of recent years, there is a strong tendency toward restricting the right to contract. Almost every state now has a law regulating hours of service upon public works and public service corporations and fixing a minimum wage to be paid

upon public works. Some states have passed laws regulating hours of service for women in factories and prohibiting children from working in them. The age of prohibition being generally fixed at from fourteen to sixteen years. A few states prohibit children under fourteen from doing any work for compensation; a number of the states have laws requiring corporations to pay their employees weekly, and most of these laws require payments to be made in actual money.

Closely allied to the above are laws prohibiting factories from building houses and renting them to their employees. This legislation, and much more of similar character, is directed at well known and generally recognized abuses. The practice of paying laborers in time checks, which were discounted by the employer or some one acting for him, or paying them in commodities furnished at a store of which the employer was the owner and usually at a price materially higher than the regular market price, and building houses and requiring employees to occupy them at exorbitant rental, were all very great evils; yet they have not been abolished without curtailing a right which was at one time sacredly guarded by the law; namely, the right to freedom of contract; nor have these rights been surrendered without some attending inconvenience. During the panic of 1907, a number of factories were compelled to close because the employees could not be paid, in part, in time checks, although the employers were willing, and the employees anxious, to make such an arrangement.

It is surprising to note in connection with labor legislation and legislation creating boards and commissions, how much of this ancient right to contract has gone. Nor does its loss excite any considerable protest. The average man seems willing to surrender the substance if he may retain the form of freedom. A man who would shoulder his musket to defend his rights to vote for road supervisor will surrender his right to fix by contract the rate which he shall pay for shipping his produce; or the price of the gas or electricity he consumes; or the number of hours he may work at a giving calling, without a murmur. Legislative interference with the individual citizen is gradually intruding itself into every walk of life. The occupations of barbers, plumbers, blacksmiths, coal dealers and junk dealers are, one at a time, being brought within the supervision of the law. No matter in what field of endeavor the citizen may be engaged, the tendency is to substitute for his individual judgment and discretion, the judgment and discretion of the state.

It is not the purpose of this paper to contend that the good accomplished by this class of legislation is of greater or less value than the rights surrendered, but merely to note its departure from what were once considered fundamental principles of the law. In all of this class of legislation is discernable the strong tendency of our

government toward paternalism, and it may not be out of place to observe that when a government has become paternal in its nature, it has taken a long step toward socialism. When we have brought a few more trades and occupations under the supervision of the law, and a few more industries under the control of boards and commissions, and clothe them with a few additional powers, we have but to take one more step—transfer the title to property to the government, and socialistic government is already organized, equipped and in working order.

Perhaps the most harmful feature of modern legislation is the tendency which in recent years amounts to a mania to tinker with the law without any definite end or purpose in view. Legislators, who know nothing of the law as it now exists, consider themselves perfectly competent to amend, repeal or modify. Just as the lawyers are beginning to be able to advise their clients of their legal rights, and courts to enforce those rights under existing laws, we have a new session of the legislature attended by a cloudburst of legislation and chaos. A lawyer opens a new volume of the session laws with feelings very much akin to those with which he would unpack an infernal machine. He knows that he will find that property rights have been changed at random; that rules of court procedure have been established by men who would not know the difference between a demurrer and a bill of particulars; that crimes have been created involving neither wrongful intent nor moral turpitude.

In 1881, the legislature of the then territory of Washington revised and codified the laws. The laws thus compiled are known as the code of 1881. This volume consists of 580 pages, exclusive of the index, and contains all necessary legislation. Since that time, sixteen volumes of session laws have accumulated, and the laws now in force aggregate something over four thousand pages. It may well be doubted, however, if justice is more speedily or more adequately administered, or if the business of the state and its municipalities is more economically or satisfactorily transacted than it would have been had there never been a session of the legislature since. This does not imply that some good laws have not been enacted since that time, but the uncertainty incident to constant change has probably been productive of as much evil as the good laws enacted have remedied.

Among other things, the code of 1881 provides for the levy and collection of taxes. It is interesting to note the vicissitudes through which this law has passed since its enactment. By its terms taxes became delinquent on the 31st day of December, at six p. m. The legislature of 1889 changed the date of delinquency to June 1st; the legislature of 1891 changed the date to March 1st; in 1893 it was

changed to April 1st, and in 1895 it was again changed to June 1st, where it now remains. Two legislatures since that date have re-enacted the section fixing the date at June 1st. I have mentioned the time of delinquency merely as an illustration. Almost every section of the law has encountered a similar fate. The code of public instruction has also been a favorite field for legislative activity. Every legislature since 1881, with the exception of 1905, has juggled with this act. The sections providing for the time for holding elections; the distributing of the school fund; the duties of directors, and the duties and powers of county superintendents have been shaken up from time to time like the contents of a trick box.

It would be tiresome to go into details with reference to the changes that have been made in regard to the insurance laws; the public land laws; the road laws; the game and fish laws; the military code and the election laws. They, like all others upon our statute books have been the victims of the modern mania for legislation. Nor is Washington the only state afflicted in this regard. Our expertence is the experience of every state in the Union; but, strange as it may seem, the popular criticism which this changing of the law arouses is directed, not at the legislature, but at the courts.

If the courts declare one of these acts unconstitutional, they are accused of over-riding the will of the people as expressed by the legislature. If they attempt to construe them into intelligent meaning, we hear of "judge-made" law; if they follow them, they are censured for allowing justice to be defeated by adherence to technicalities. Most of these useless changes in the law are doubtless due to the prevalent American notion that law-making is the one occupation that requires no previous education or experience.

"A man must serve his turn at every trade,
Save censure; Critics all are ready made,"

says Lord Byron in his "English Bards and Scotch Reviewers." We have placed law-makers in this class.

The blacksmith who should undertake to repair the delicate mechanism of a watch; the butcher who should attempt a serious surgical operation; the stone cutter who should try to trace the graceful curves of the Venus di Milo, would bring to the undertaking experience as adequate and training as well suited to the task as is possessed by the average legislator for the duty of making law.

When it is considered that all property rights originate in the law; that all contractual relations are governed by it and that life and liberty look to it for protection, it would seem that public sentiment should demand that it be given some degree of permanency; but the more laws that are made, the more are demanded. According to the

popular conception, the legislature does not change them with sufficient rapidity, and a clamor arises for the initiative and referendum in order that legal principles may be abolished and rules of law unsettled without the intervention of the middle man.

Where will it all end? Will we sometime learn that property, liberty and morality are best guarded by laws reflective of the settled convictions of years, or will we continue to place the passing whim of every agitator and notoriety seeker upon our statute books until we reach that condition which, one morning upon the plains of Shinar, found the descendants of Noah babbling, each in a language that none of the others understood.

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